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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

UNITED FOOD & COMMERCIAL  
WORKERS LOCAL 99, et al.,

Plaintiffs,  
vs.

JAN BREWER, in her capacity as Governor of the State of Arizona; et. al.,

#### Defendants.

CASE NO. CV11-0921 PHX-GMS

DEPT: XX

**PLAINTIFFS' OPPOSITION TO  
STATE DEFENDANTS' MOTION TO  
DISMISS**

1     **I. INTRODUCTION AND SUMMARY**

2         The state officials who are defendants moved to dismiss this action arguing  
3 primarily that Plaintiffs' claims are not ripe because these defendants have not expressly  
4 threatened to enforce SB 1363 and SB 1365 against Plaintiffs. The key problem with this  
5 argument is that Plaintiffs' FAC pled these new laws are already having effects on their  
6 conduct and speech by changing how they operate so they can avoid any prosecution.  
7 These laws are also impairing their bargaining power with employers in current and  
8 upcoming bargaining agreement. Plaintiffs' fears of arrest or other prosecution are not  
9 idle because they allege they are active in engaging in group speech in front of  
10 workplaces, in speaking critically of employers in ways which have drawn claims of  
11 falsity in the past, and in using some dues deducted from paychecks for politics.

12         SB 1363 makes sweeping changes to Arizona law which put into doubt the  
13 legality of Plaintiffs' current picketing and organizing practices, thus impacting their  
14 conduct due to fear of prosecution. SB 1363 creates criminal liability for defamation of  
15 employers (as newly-defined) and for "unlawful mass assembly" (including any assembly  
16 in an "unreasonable" manner). It defines these and other offenses as forms of "workplace  
17 harassment" for which injunctions can issue without notice under a lower-than-normal  
18 evidentiary burden, and enlists law enforcement officers in enforcing such injunctions. It  
19 broadens the definition of "defamation" to encompass negligent falsity (contrary to U.S.  
20 Supreme Court precedent).

21         SB 1365 makes sweeping changes to Arizona law which burden Plaintiffs' ability  
22 to collect voluntary dues from their members: it would now be illegal for an "employer to  
23 deduct payment for political purposes unless the employee annually provides written or  
24 electronic authorization to the employer for the deduction." A.R.S. 23-361.02. Requiring  
25 unions to collect employee signatures for this purpose on an annual basis is imposing a  
26 substantial logistical and financial burden, one already occurring because of the need to  
27 create systems now to handle the law's upcoming October 1st effective date. SB 1365  
28 also burdens unions by forcing them to provide employers with a "statement that

1 indicates the maximum percentage of payment that is used for political purposes.” If  
 2 Plaintiffs submit an inaccurate statement, the law imposes a \$10,000 penalty. Thus,  
 3 Plaintiffs have to work now on determining with greater exactitude what they and their  
 4 parent Internationals are likely to spend.

5       The ripeness inquiry here is greatly impacted by the fact both laws violate  
 6 Plaintiffs’ constitutional rights as to speech and assembly. Under settled law, a suit over  
 7 violations of speech rights is ripe when a plaintiff reasonably censors himself rather than  
 8 face prosecution. Plaintiffs allege they are doing this in the FAC. For example, SB 1365  
 9 is causing Plaintiffs to censor themselves because Plaintiffs have “spent and absent SB  
 10 1365 plan[] to continue to expend union treasury funds for ‘political purposes’ as that  
 11 term is defined in SB 1365.” FAC ¶ 18. Plaintiffs’ FAC alleges the threat of prosecution  
 12 under SB 1363 “is deterring Plaintiffs . . . from engaging in a significant amount of  
 13 [union] activities.” FAC ¶ 112. As a result, Defendants’ motion to dismiss lacks merit.

14       However, if somehow there is insufficient detail in the FAC, Plaintiffs are entitled  
 15 to leave to amend. Plaintiffs could amend the FAC to spell out in greater detail the  
 16 regularity of their past and current speech and assembly which would subject them to  
 17 arrest, including conduct at State facilities and State roadways which the State (the  
 18 Governor and AG) can pursue as an “employer” under SB 1463 or in the AG’s  
 19 prosecutorial capacity.

## 20       **II. STATEMENT OF FACTS**

21       The Plaintiffs are United Food & Commercial Workers Local 99 (“UFCW”), UA  
 22 Plumbers and Steamfitters Local 469, and the top officer and an active member in each.  
 23 Local 99 has 18,000 members and organizes in several different industries, having  
 24 members not only in the food industry, but also museum technicians, legal aid attorneys,  
 25 parking lot cashiers, and janitors. See [www.ufcw99.org](http://www.ufcw99.org). Defendants are members of  
 26 Arizona’s executive branch responsible for enforcing SB 1363 and SB 1365. Defendant  
 27 Brewer is Governor and “responsible for carrying out the laws enacted by the Legislature,  
 28 including enforcement of SB 1363 through the Department of Public Safety and

1 overseeing the Labor Department of the Industrial Commission which is responsible for  
 2 enforcing some of the provisions of SB 1363 and SB 1365.” FAC ¶11. Defendant Horne  
 3 is Arizona Attorney General and the State’s chief legal officer responsible under SB 1365  
 4 for adopting regulations and enforcing penalties. Defendant Maruca is the Director of the  
 5 state Labor Department (within the ICA) responsible for adjudicating wage claims  
 6 brought by Arizona workers whose wages are deducted in violation of either SB 1363 or  
 7 SB 1365. Defendant Bennett is the Secretary of State, responsible for compiling and  
 8 distributing “a so-called ‘No Trespass Public Notice List’ to all law enforcement agencies  
 9 in the state in order to carry out the forced expulsion of any trade unionist whom an  
 10 employer asks to be expelled from some property.” FAC ¶ 12.

11 Plaintiffs allege a well-grounded fear of prosecution under SB 1363 because they  
 12 “have regularly engaged in union activities on sidewalks and parking lots in front of their  
 13 employer’s facilities.” FAC ¶111. Some of those facilities are located alongside state  
 14 roads where DPS is called when unionists assemble. Some of those facilities now include  
 15 state office buildings where janitors work for a contractor being organized by UFCW.  
 16 Plaintiffs also fear future prosecution because they “have regularly engaged in speech  
 17 critical of employers and been accused of defamation . . .” FAC ¶117. Plaintiffs allege  
 18 fear of prosecution under SB 1365 because provisions of the Act are “impermissibly  
 19 vague[,]” FAC ¶47-50, and because “Plaintiff Unions have “spent and absent SB 1365  
 20 plan[] to continue to expend union treasury funds for ‘political purposes’ as that term is  
 21 defined in SB 1365.” FAC ¶18.

22 Plaintiffs are already suffering injury resulting from passage of SB 1363 because  
 23 fear of prosecution under the Act is having a “deterrent effect” on continued criticism of  
 24 employers and participation in union activities. FAC ¶¶ 78,117. As a result of the fear of  
 25 enforcement of SB 1363, Plaintiffs “suffer inherently-irreparable injuries to their speech  
 26 and assembly rights, to union members’ receipt of representation and to union officials’  
 27 functioning as labor representatives.” FAC ¶10. Plaintiffs are also already suffering  
 28 injury from fear of enforcement of SB 1365 because it “will chill employers from

1 agreeing to continue with payroll check-off systems[,]” (FAC ¶3), and because  
 2 compliance with SB 1365 “necessitates immediate and extensive efforts by unions and  
 3 employers to avoid devastating impacts on [October 1, 2011].” *Id.* Further facts are set  
 4 forth in the declarations filed with Plaintiffs’ motion for preliminary injunction.

5 **III. ARGUMENT**

6       **A. THIS COURT HAS SUBJECT MATTER JURISDICTION TO  
 7 ADJUDICATE PLAINTIFFS’ CLAIMS**

8           Defendants moved to dismiss under Rule 12(b)(1) with no basis, as Plaintiffs’  
 9 FAC demonstrates this Court has subject-matter jurisdiction. Defendants’ motion makes  
 10 no arguments about jurisdiction besides stating that “Plaintiffs have the burden of  
 11 establishing that this Court has jurisdiction.” Plaintiffs readily satisfied this burden.  
 12 First, this Court has subject-matter jurisdiction to adjudicate Plaintiffs’ claim because  
 13 their FAC alleges that SB 1363 and 1365 are preempted by federal laws. FAC ¶¶ 2, 5.  
 14 The Supreme Court has held subject-matter jurisdiction exists under 28 U.S.C. § 1331  
 15 when a claim alleges that state law is preempted by federal law. *Shaw v. Delta Air Lines,*  
 16 *Inc.*, 463 U.S. 85, 96 n.14 (1983) (“[A] plaintiff who seeks injunctive relief from state  
 17 regulation, on the ground that such regulation is pre-empted by a federal statute . . .  
 18 presents a federal question which the federal courts have jurisdiction under 28 U.S.C. §  
 19 1331. . . .” (citing *Ex parte Young*, 209 U.S. 123, 160–62 (1908)).

20           Second, this Court also has subject-matter jurisdiction to adjudicate Plaintiffs’  
 21 claims because their FAC alleges that SB 1363 and 1365 violate U.S. Constitution. When  
 22 a complaint “is so drawn as to seek recovery directly under the Constitution . . . the  
 23 federal court . . . must entertain the suit.” *Bell v. Hood*, 327 U.S. 678, 681-82 (1946). The  
 24 only two exceptions are when a constitutional claim “appears to be immaterial and made  
 25 solely for the purpose of obtaining jurisdiction or where such a claim is wholly  
 26 insubstantial and frivolous.” *Id.* at 682. Here, Plaintiffs’ FAC explained in detail how SB  
 27 1363 and 1365 “facially violate the First and Fourteenth Amendment to the U.S.  
 28 Constitution.” FAC ¶ 81. Plaintiffs specifically allege SB 1363 “violate[s] [their]

1 constitutional rights in at least six ways[,]” FAC ¶ 2, and allege SB 1365 violates their  
 2 rights under the First Amendment, Due Process Clause, and Fourteenth Amendment.  
 3 FAC ¶ 6. Plaintiffs then detail in specific terms why this is so. FAC ¶ 33-127. Their  
 4 constitutional claims are not immaterial or frivolous. In their FAC, Plaintiffs also note  
 5 this Court has jurisdiction over this action under 42 U.S.C. § 1988, 29 U.S.C. §§ 1332  
 6 and 1343, and 29 U.S.C. § 1367. Thus Plaintiffs have in multiple ways satisfied their  
 7 burden to prove subject-matter jurisdiction, and this Court cannot dismiss under Rule  
 8 12(b)(1).

9                   **B. PLAINTIFFS’ CLAIMS ARE CONSTITUTIONALLY RIPE**  
 10                   **BECAUSE THEY ARE SUFFERING INJURIES IN FACT**  
 11                   **CAUSED BY THE FEAR OF FUTURE ENFORCEMENT**

12                 Defendants allege Plaintiffs’ claims are not yet constitutionally ripe because no  
 13 prosecution of these new laws has begun. This defense, however, mischaracterizes  
 14 Plaintiffs’ FAC by completely ignoring that the FAC alleges several already-existing  
 15 injuries. In their FAC, Plaintiffs allege that they are *already* suffering injuries due to the  
 16 well-grounded fear of future prosecution under SB 1363 and SB 1365. These injuries  
 17 exist first through self-censorship which is articulated clearly. These allegations satisfy  
 18 the injury-in-fact requirement for constitutional ripeness.

19                 Defendants’ motion to dismiss mischaracterizes the appropriate standards for  
 20 determining constitutional ripeness by citing *Thomas v. Anchorage Equal Rights*  
 21 *Comm’n*, 220 F.3d 1134 (9th Cir. 2000) (outlining ripeness requirements for a Free  
 22 Exercise Clause violation), rehearing granted and opinion withdrawn, 192 F.3d 1208 (9th  
 23 Cir. 1999). Application of that case’s standards are inappropriate here because the  
 24 opinion was later withdrawn by the Ninth Circuit and because Plaintiffs’ claims allege  
 25 injury to their speech rights. The standards for determining constitutional ripeness when a  
 26 Plaintiffs’ ability to speak freely are infringed are different. Although it is still true that  
 27 Plaintiffs must show a new law has caused them to suffer an injury in fact, when  
 28 challenging statutes which restrict speech, courts have stated such injury in fact can be

1 satisfied by alleging that as a result of fearing future prosecution, a plaintiff has modified  
 2 behavior in which he engaged in the past and would like to continue. When a challenged  
 3 statute risks chilling the exercise of a plaintiff's First Amendment rights, "the Supreme  
 4 Court has dispensed with rigid standing requirements[,"] "*Cal. Pro-Life Council, Inc. v.*  
 5 *Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003), and recognized self-censorship as "a harm  
 6 that can be realized even without an actual prosecution." *Id.* at 1095.<sup>1</sup> Thus courts  
 7 encourage pre-enforcement challenges of statutes which violate constitutional rights to  
 8 speak.<sup>2</sup> Pre-enforcement First Amendment challenges are especially appropriate when a  
 9 law is targeted directly at a group of plaintiffs, as here. See, e.g., *Virginia v. American*  
 10 *Booksellers Ass'n*, 484 U.S. 383, 392-3 (1988) (holding bookstores' facial challenge to  
 11 ordinance was ripe where statute means plaintiffs "will have to take significant and costly  
 12 compliance measures or risk criminal prosecution.").

13 In the labor context, cognizable injury occurs at a pre-enforcement stage when a  
 14 "party is faced with the choice between the disadvantages of complying with an  
 15 ordinance or risking the harms that come with noncompliance . . ." *Metropolitan*  
 16 *Milwaukee Ass'n of Commerce v. Milwaukee County*, 325 F.3d 879, 883 (7th Cir. 2002).  
 17 "As we have noted in the standing context, the increased uncertainty and risk that  
 18 accompanies such a change constitutes an injury." *Id.* Plaintiffs plead they are actively

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 20 <sup>1</sup> See also *Bland v. Fessler*, 88 F.3d 729, 736-37 (9th Cir. 1996) ("That one should not  
 21 have to risk prosecution to challenge a statute is especially true in First Amendment cases  
 22 . . ."); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9<sup>th</sup> Cir. 2000) ("[W]hen the threatened  
 23 enforcement effort implicates First Amendment rights, the inquiry tilts dramatically  
 24 toward a finding of standing.").

25  
 26 <sup>2</sup> "In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has  
 27 endorsed what might be called a 'hold your tongue and challenge now' approach rather  
 28 than requiring litigants to speak first and take their chances with the consequences." *Ariz.*  
*Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (finding a plaintiff had  
 suffered sufficient injury for standing although plaintiff had neither violated the statute  
 nor been subject to any legal penalties, plaintiff was forced to modify its speech and  
 behavior to comply with the statute).

1 suffering an injury in fact because fear of prosecution under SB 1363 by Defendants “is  
 2 deterring Plaintiffs . . . from engaging in a significant amount of [union] activities” (e.g.,  
 3 picketing and leafleting in front of employers). FAC, ¶ 112. Employers have SB 1363’s  
 4 early dues termination provision available as a weapon against the unions now made even  
 5 more potent than it was for the grocers in the last round of negotiations. SB 1365 is  
 6 causing Plaintiffs to undertake “immediate and extensive efforts . . . to avoid devastating  
 7 impacts on [the date SB 1365 goes into effect].” FAC, ¶ 3. These efforts include creating  
 8 a new system for gathering over 21,000 signatures annually, and renegotiating contracts  
 9 amidst the newly-imposed fear caused by SB 1365 causing employers to more strongly  
 10 oppose agreeing to deduct dues.

11 This self-censorship and burden on bargaining are each a “constitutionally  
 12 sufficient injury,” *Cal. Pro-Life Council*, 328 F.3d at 1107, because based on “an actual  
 13 and well-founded fear that the challenged statute will be enforced.” *Id.* at 1095.  
 14 Plaintiffs’ fear of prosecution under both laws is well-founded because “the State has not  
 15 disavowed any intention of invoking the criminal penalty provision[s] [of the new Acts]  
 16 against unions,” *Babbitt v. United Farm Workers*, 442 U.S. 289, 302 (1979), and  
 17 Plaintiffs have assembled (and would like to continue assembling) in ways that “some but  
 18 not all people would find unreasonable . . . .” FAC, ¶ 34. Thus, Plaintiffs are not “without  
 19 some reason in fearing prosecution for violation of the ban on specified forms of [union  
 20 activities] . . . [and] the positions of the parties are sufficiently adverse . . . .” *Babbitt*,  
 21 442 U.S. at 302.

22 **1. Plaintiffs’ fear of future prosecution under SB 1363 is well-founded**

23 Plaintiffs fear prosecution under SB 1363 because an injunction could easily issue  
 24 at any time. First, this law’s provisions very broad: for example, it “criminalizes any  
 25 assemblies by labor [performed] in an ‘unreasonable’ manner, without defining this term  
 26 in any way other than saying it should not be construed to violate federally-protected  
 27 rights.” FAC ¶2, citing ARS 23-1327(A)(5) and (B). Plaintiffs “have no way of knowing  
 28

1 what a judge would consider ‘unreasonable’ in assembling[,]” FAC ¶87, and fear future  
 2 prosecution under SB 1363 because have engaged and will engage in activity that “some  
 3 but not all people would find unreasonable . . .” FAC ¶85. Every time a union  
 4 encourages a consumer boycott of an employer or lobbies against its relicensing  
 5 (commonplace conduct protected by the NLRA and First Amendment), this is arguably  
 6 destruction of the “intangible property” of the employer (consumer goodwill) and hence a  
 7 violation of the new ARS 12-1321(1). UFCW is in current disputes with several  
 8 employers against which it would call boycotts but for fear of this statute.

9       The injunction enforcement provisions indicate it is likely that DPS (and hence the  
 10 AG) will have to enforce this law against Plaintiffs, even if they currently do not plan to  
 11 do so. When an employer is successfully granted an injunction against Plaintiffs under  
 12 the authority granted to state courts in SB 1363,<sup>3</sup> a violation of such injunction constitutes  
 13 the crime of interfering with judicial proceedings. ARS 12-1810(H). Then any peace  
 14 officer may arrest a person for violating such injunction based on probable cause  
 15 “[w]hether or not a violation occurs in the presence of a peace officer, with or without a  
 16 warrant”. ARS 12-1810 (M). Peace officers are immunized from liability for such arrests.  
 17 ARS 12-1810(P). Once such an injunction is granted in Arizona, DPS will have little or  
 18 no choice but to enforce it when the union’s conduct is next to state roads or at state  
 19 buildings, which is commonplace.

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22 <sup>3</sup> Section 2 of SB 1363 (codified at ARS 12-1810) in paragraph E expressly dispenses  
 23 with the normal requirements for preliminary injunctive relief in ARCP Rule 65(a) that  
 24 “[n]o preliminary injunction shall be issued without notice to the adverse party” and then  
 25 instead provides lower standards: “If the court finds reasonable evidence of harassment of  
 26 the plaintiff by the defendant during the year preceding the filing of the petition or that  
 27 good cause exists to believe that great or irreparable harm would result to the plaintiff if  
 28 the injunction is not granted before the defendant or the defendant’s attorney can be heard  
 in opposition and the court finds specific facts attesting to the plaintiff’s efforts to give  
 notice to the defendant or reasons supporting the plaintiff’s claim that notice should not  
 be given.” ARS 12-1810(E) dispenses with the requirement of ARCP Rule 65(e) that a  
 bond be posted, thereby encouraging pursuing of injunctions without solid grounds.

Indeed, on the trespass issue, SB 1363 mandates law enforcement officials remove unionists without making any further inquiry into the bona fides of an employer's request for trespass arrest if this employer listed the property with the Secretary of State (ARS 23-1326(F)). This is highly likely of enforcement under common situations where the NLRA would privilege the Union's activity: current employees of an employer have a right to be present off-duty on their employer's facilities to engage in union activities;<sup>4</sup> non-employee union agents have access rights when an employer lets other outsiders use the property for speech<sup>5</sup> or when the employer is not the actual owner but merely a lessee sharing common areas.<sup>6</sup> Also, most union contracts provide for union representatives to have access, and the NLRA gives union representatives the right to observe working conditions inside facilities where they are the designated representative.<sup>7</sup> But DPS has been ordered by the Legislature to ignore those reasons for unionists' activities to be taking place on employer property, and instead just arrest them if an employer requests.

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<sup>4</sup> *Tri-County Medical Center*, 222 NLRB 1089 (1976); *First Healthcare Corp. v. N.L.R.B.*, 344 F.3d 523 (6th Cir. 2003).

<sup>5</sup> *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F. 3d 583, 587 (D.C. Cir. 1996) ("First, under the 'inaccessibility' exception, an employer violates section 8(a)(1) if it denies a union access to the employer's property where the union has no other reasonable means of communicating its message to employees. [cites] Second, under the 'non-discrimination' exception, an employer engages in discrimination as defined by section 8(a)(1) if it denies union access to its premises while allowing similar distribution or solicitation by nonemployee entities other than the union. [cites]").

<sup>6</sup> *Wild Oats Markets*, 336 NLRB 179 (2001) (employer violates Act by calling police to remove union agents from parking lots it did not own but merely leased and shared with others); *O'Neil's Markets, Inc. d/b/a Food For Less*, 318 NLRB 646 (1995); *Victory Markets*, 322 NLRB 17 (1996); *A&E Food Co. I, Inc.*, 339 NLRB 806 (2003); *UFCW, Local 400 v. NLRB (Farm Fresh)*, 222 F.3d 1030 (D.C. Cir. 2000).

<sup>7</sup> *NLRB v. Unbelievable, Inc. d/b/a Frontier Hotel*, 71 F.3d 1434, 1438-1439 (9th Cir. 1995); *NLRB v. C.E. Wylie Construction Co.*, 934 F.2d 234, 238-239 (9th Cir. 1991); *NLRB v. Villa Avila*, 673 F.2d 281, 283-284 (9th Cir. 1982).

1 The State is also an “employer” under this law (ARS 12-1810R), meaning it too can  
 2 pursue civil remedies against UFCW at state buildings where it is organizing janitors.

3       The dispute over SB 1363’s dues termination provision is ripe because the FAC  
 4 alleges that members regularly seek to end dues earlier than their one-year contractual  
 5 commitment: more than a dozen UFCW members per month on average request early  
 6 exit (many are modestly-paid courtesy clerks who find themselves running into financial  
 7 troubles). SB 1363 effectively allows them to simply send a letter to their employer to get  
 8 out whenever they want.

9       Plaintiffs’ claims regarding injury are not speculative because Plaintiffs  
 10 reasonably allege it is impossible that certain provisions of SB 1363 and SB 1365 can  
 11 ever be applied in a constitutional manner. For example, there is no way unless the  
 12 Supreme Court reverses itself that a state can impose liability for secondary boycotts or  
 13 negligent misstatements in labor disputes. Fear of prosecution under the unconstitutional  
 14 provisions of SB 1363 is also well-founded because Defendants have not stated they will  
 15 not enforce it. Indeed, they have no authority to declare a statute unconstitutional and  
 16 decline to enforce it. Nor have they indicated they will abide by a ruling of  
 17 unconstitutionality reached against the Sheriff.<sup>8</sup>

18           **2. Plaintiffs’ fear of future prosecution under SB 1365 is even more  
 19 well-founded**

20       Plaintiffs fear prosecution under SB 1365 because if they did not immediately  
 21 change their practice of spending some money on politics without annual signatures from  
 22

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23       <sup>8</sup> The track record of Arizona officials adds reasonableness to Plaintiffs’ fears here of  
 24 future unconstitutional prosecution under these laws. See, e.g., *United Steelworkers of  
 25 America v. Phelps Dodge Corp.* (9th Cir. 1989) 865 F2d 1539, *cert. denied* 493 US 809  
 26 (1989) (reversing summary judgment in action alleging employer and state law  
 27 enforcement officers conspired to violate civil rights of striking union members).  
 28 Moreover, UFCW’s members were met with interference from DPS not long ago when  
 they demonstrated along a state road near the Eurofresh plant, and UA’s members at  
 mines in the Globe area.

1 members, they would be in violation on October 2nd. Even after signature solicitation, it  
2 would be easy through clerical error for an employee to continue having dues deducted  
3 even though he did not sign a new authorization that year. Also, this law “imposes a  
4 minimum penalty of \$10,000 per inaccurate union statement of maximum [political]  
5 spending, and does not require the violation be intentional or negligent, nor even that the  
6 conduct have been within the local’s control.” FAC ¶75. Fear of enforcement is  
7 amplified by the fact some part of the money deducted from members’ paychecks goes to  
8 the international parent of plaintiff unions. If the international does not accurately  
9 estimate the proportion of members’ dues that it will spend on politics, Plaintiffs would  
10 be “[p]unish[ed] for conduct of their internationals to which the [Plaintiffs] must make  
11 payments, conduct over which the [they] have no control.” FAC ¶74. Plaintiffs do not  
12 have the option of disaffiliating to avoid liability because to “disaffiliate would lead the  
13 [Plaintiffs]’ assets to revert to the International.” FAC ¶37.

14 Also, Plaintiffs reasonably fear punishment under SB 1365 because it is  
15 impermissibly vague in defining terms like “political issue advocacy” and groups  
16 “similar to” political action committees. The FAC at ¶ 47 lists the commonplace union  
17 activities which may or may not be included (for example, communicating with City  
18 officials about working conditions of UFCW’s members working at Phoenix Airport, and  
19 aiding legal defense organizations defending speech). Plaintiffs also reasonably fear  
20 prosecution because SB 1365 does not define whether “payment from an employee’s  
21 paycheck for political purposes” includes “the time spent by salaried union staff who  
22 spend only a small minority of their time on lobbying and political activities.” FAC ¶ 48.  
23 This vagueness must cause Plaintiffs to issue a misleading over-projection of their  
24 political spending, which likely will deter workers from belonging because they do not  
25 want that much spent on politics. Nor do workers enjoy being bothered constantly for  
26 their signatures. This law is currently harming Plaintiffs because it is making employers  
27 and workers more reluctant to participate in these voluntary dues deduction agreements  
28

1 and forcing Plaintiffs to make elaborate administrative arrangements to start collecting  
 2 over 21,000 signatures per year.

3           **C. PLAINTIFFS' CLAIMS ARE PRUDENTIALLY RIPE BECAUSE  
 4 THE ISSUES IN THE FAC ARE PURELY LEGAL AND BECAUSE  
 5 PLAINTIFFS WILL SUFFER HARSHIP IF THIS COURT  
 6 WITHHOLDS CONSIDERATION**

7           To assess prudential ripeness, courts must evaluate “both the fitness of the issues  
 8 for judicial decision and the hardship to the parties of withholding court consideration.”  
*Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Plaintiffs’ claims are  
 9 sufficiently ripe because “when fear of criminal prosecution under an allegedly  
 10 unconstitutional statute is not imaginary or wholly speculative a plaintiff need not first  
 11 expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.”  
*Babbitt*, 442 U.S. at 302 (holding a union had standing to sue the State to challenge a new  
 12 state law because “fear of criminal prosecution under [the] statute is not imaginary or  
 13 wholly speculative” when Union has “actively engaged in consumer publicity campaigns  
 14 [prohibited by the statute] in the past and has alleged their intention to continue to engage  
 15 in boycott activities.”).

16           The issues in this case are fit for judicial review because the challenges posed to  
 17 SB 1363 and SB 1365 by Plaintiffs are facial and purely legal, and the court would not  
 18 significantly benefit from further factual development.<sup>9</sup> Indeed, a finding of preemption  
 19 and unconstitutionality would not be difficult to reach because some parts of SB 1363  
 20 and SB 1365 are clearly in conflict with past appellate precedent. For example,  
 21

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22  
 23           <sup>9</sup> Even if further factual development would be of some benefit to the court, that fact  
 24 alone does not lead courts to find this type of suit unripe. See *Metropolitan Milwaukee  
 25 Ass'n of Commerce*, 325 F.3d at 882 (holding employer association’s action against  
 26 county for passing ordinance allegedly violative of NLRA and First Amendment ripe  
 27 before actual enforcement because, although it would be useful to have the benefit of the  
 28 County’s interpretation of the ordinance, the absence of this information does not  
 preclude judicial review since the complaint raised “almost purely legal issues” that are  
 “quintessentially fit . . . for present judicial resolution.”).

1 redefining defamation of employers to include negligent rather than intentional or  
 2 reckless misstatements is nothing short of open defiance of *Linn v. Plant Guard Workers*,  
 3 383 US 53, 64-65 (1966) and its progeny.<sup>10</sup>

4 The preenforcement nature of this action should not trouble this Court because  
 5 Defendants “ha[ve] not suggested that the newly enacted law will not be enforced, and  
 6 [the court should] see no reason to assume otherwise.” *American Booksellers*, 484 U.S. at  
 7 393. Plaintiffs also satisfy prudential ripeness because delayed judicial determination has  
 8 already caused them hardship and will continue to cause hardships. SB 1363 is already  
 9 “curtailing such activities” as picketing, boycotting, and union speech. FAC ¶86-87. As  
 10 long as SB 1363 is not enjoined, Plaintiffs’ effectiveness at representing their members’  
 11 interests in the State will be continually impaired. Delayed adjudication of the  
 12 constitutional issues here will cause additional hardship to Plaintiffs because it will  
 13 continually injure Plaintiffs’ ability to engage in publicity against employers by placing  
 14 Plaintiffs in “the dilemma of incurring the disadvantages of complying [with SB 1363] or  
 15 risking penalties for noncompliance.” *Whitney v. Heckler*, 780 F.2d 963, 968-69 n. 6  
 16 (11th Cir.1986) (“It is well established that [a case with this type of dilemma] is ripe for  
 17 judicial review . . .”), *cert. denied*, 479 U.S. 813.

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18

<sup>10</sup> SB 1363 “expand[s] employer remedies for union violations of an anti-picketing  
 19 statute already struck down as unconstitutional by the Arizona Supreme Court.” FAC ¶ 2  
 20 See *Baldwin v. Arizona Flame Restaurant, Inc.*, 82 Ariz. 385, 313 P.2d 759 (Ariz. 1957)  
 21 (The plain wording of section 56-1310 [also in ARS 23-1322] . . . effectively provides  
 22 that under all circumstances, regardless of purpose, a union having less than a majority is  
 23 prohibited from all peaceful picketing. Such clearly on its face constitutes a general  
 24 prohibition against peaceful picketing in violation of the United States Constitution . . .  
 25 .”) The bill also “contains additional punishments for secondary boycotts which the U.S.  
 26 Supreme Court has already held that state laws cannot seek to provide. . . .” FAC ¶2  
 27 (citing *Teamsters v. Morton*, 377 U.S. 252 (1964)(“state law has been displaced by  
 28 section 303 in private damage actions based on peaceful union secondary activities.”).  
 See also *Smart v. Local 702 IBEW*, 562 F.3d 798, 808 (7th Cir. 2009) (Section 303  
 “completely preempts state-law claims related to secondary boycott activities described  
 in section 158(b)(4); it provides an exclusive federal cause of action for the redress of  
 such illegal activity.”).

Delayed adjudication of SB 1365's constitutionality poses similarly irreversible hardship to Plaintiffs. If this Court does not promptly declare SB 1365 unconstitutional, it "chill[s] employers from agreeing to continue with payroll check-off systems for two reasons: first, SB 1365 exposes employers to potential risk of large civil penalties if they fail to terminate dues checkoff or the Union misproject[s] its political spending. Second, for an employer who does not seek to intrude into internal union matters but is acting in good faith and does not wish to violate federal labor law, SB 1365 creates uncertainty by not defining [many of its terms.]" FAC ¶ 3. SB 1365 also causes Plaintiffs hardship because compliance with it "necessitates immediate and extensive efforts by unions and employers to avoid devastating impacts." FAC ¶ 3. That is, it requires each union create a new system for monitoring the annual anniversary date of every member and then doing mailings, followup calls and visits to members whose anniversary years are about to expire so as to obtain timely signatures. Beginning October 1st, each union will need have received in the preceding couple weeks (the exact time period the AG has not specified) a new signature from each member reaffirming his prior commitment to have dues deducted for a union's ordinary activity of issue advocacy.

Delayed determination of these laws' constitutionality injures Plaintiffs because threat of enforcement substantially affects Plaintiffs' bargaining power with employers by (1) supporting the pressure tactic of grocery employers against UFCW in recent negotiations of urging members to cease paying dues, even if prematurely; and (2) impairing the effectiveness of important weapons in Plaintiffs' arsenal. By substantially affecting Plaintiffs' ability to employ picketing as weapons against employers, SB 1363 "permanently and substantially shifts the terms of bargaining . . . even in situations where the possibility of [picketing] appears remote." *Employers Ass'n v. United Steelworkers*, 32 F.3d 1297, 1299-1300 (8th Cir.1994)(holding action against state for passing statute making it illegal to hire permanent replacements for strikers was ripe even though unions had not yet called a strike against any member employer); *Chamber of Commerce v. Reich*, 57 F.3d 1099, 1100 (D.C.Cir.1995) (holding challenge to Executive Order

1 disqualifying any contractor which permanently replaces strikers was ripe because the  
 2 mere existence of the order “alters the balance of bargaining power between employers  
 3 and employees by . . . depriving them of a significant economic weapon in the collective  
 4 bargaining process.”).

5       Delayed consideration of Plaintiffs’ claims also causes hardship because once a  
 6 “harassment” injunction issues under SB 1363, Plaintiffs cannot violate it and then  
 7 defend themselves against it on the ground that the law permitting said injunction was  
 8 unconstitutional. *State v. Chavez*, 123 Ariz. 538, 601 P.2d 301 (Ariz. App. 1979).  
 9 Because SB 1363 lowers the bar for such injunctions, it is likelier that an employer will  
 10 be able to successfully enjoin Plaintiffs from engaging in protected speech on or near  
 11 their properties. When Plaintiffs violate this injunction, they could be convicted of a  
 12 crime even though the statute authorizing this conviction is unconstitutional and Plaintiffs  
 13 had no opportunity to defend against issuance of the injunction. Also, withheld  
 14 consideration of these statutes’ constitutionality until prosecutions occur causes  
 15 Plaintiffs’ hardship in that it would likely result in the unique federal issues in Plaintiffs’  
 16 FAC having to be presented instead in Arizona criminal courts, which lack this Court’s  
 17 level of expertise on preemption and First Amendment issues.

18           **D. DEFENDANTS ARE NOT IMMUNE FROM BEING ENJOINED,  
 19 AS THEY HAVE A DIRECT ROLE IN ENFORCING THESE  
 20 LAWS**

21       Defendants are not immune from this suit because Plaintiffs are seeking to enjoin  
 22 their enforcement of unconstitutional laws they have a duty to enforce. While a suit for  
 23 declaratory relief alone is not outside 11th Amendment immunity (*Will v. Mich. Dep’t of*  
*24 State Police*, 491 U.S. 58, 71 (1989)), this is a suit primarily for injunctive relief rather  
 25 than declaratory. The Supreme Court has made clear that suits for injunctive relief against  
 26 “a state official in his or her official capacity [are permissible] because official-capacity  
 27 actions for prospective relief are not treated as actions against the State.” *Kentucky v.*  
*28 Graham*, 473 U.S. 159, 167 n.14 (1985)(citing *Ex parte Young*, 209 U.S. 123, 155-56

1 (1908). Because Plaintiffs here seek injunctive relief from enforcement of the  
2 unconstitutional SB 1363 and SB 1365 and because Defendants have duties to enforce  
3 provisions of those laws, suing Defendants in their official capacities is not akin to suing  
4 the State. We review each official's role now.

5       **1. Governor Brewer is an appropriate defendant for this suit because she  
6 is directly responsible for enforcing provisions of SB 1363 and SB 1365.**

7           Governor Brewer is an appropriate defendant for enjoining enforcement of these  
8 laws because she is responsible for carrying out the laws enacted by the Legislature. She  
9 is responsible for enforcement of SB 1363 through her oversight over DPS which polices  
10 labor activities along state roads. She is also responsible for enforcing both new laws  
11 through her oversight of the state Department of Labor (DOL). As the State's chief  
12 executive, Governor Brewer is also an appropriate defendant because she is an  
13 "employer" capable of civil enforcement of SB 1363 under its section 2 (ARS 12-  
14 1810(R). Thus, unless Governor Brewer is a party here, it is possible for her, in her  
15 capacity as an employer, to seek civil enforcement of SB 1363 when Plaintiff UFCW  
16 undertakes "unreasonable assembly" while organizing GCA Services, a custodial  
17 company that it is organizing which has contracts with the State to clean state offices.  
18

19           The likelihood that DPS will seek to enforce SB 1363 against Plaintiffs is further  
20 shown by its past conduct: on numerous occasions its officers have come out to  
21 picketlines next to state roadways, such as UFCW Local 99's picketline at the Eurofresh  
22 plant, and directed changes in those activities. Also, UFCW has demonstrated on state  
23 property in the past and hence is likely to do so in the future. For all these reasons,  
24 Governor Brewer is an appropriate defendant in this suit for reasons having nothing to do  
25 with her signing these bills.  
26  
27  
28

1           **2. Attorney General Horne is an appropriate defendant for this suit  
2 because he is directly responsible for enforcing provisions of SB 1363  
3 and 1365.**

4           Attorney General Horne is an appropriate defendant for this suit because SB 1365  
5 expressly makes his office responsible for enforcing it as well as writing the regulations  
6 thereunder. He argues, however, that he is not an appropriate defendant for all claims  
7 here because he has not been given similar responsibilities as to SB 1363. However, this  
8 has never been a requirement for enjoining a state official in an injunctive suit preventing  
9 enforcement of an unconstitutional statute.

10          The State is included under the definition of “Employer” under Section 2 of SB  
11 1363. Thus union activities on State property could be pursued by the AG. Moreover, the  
12 AG’s office is statutorily tasked with enforcing state laws on state roads which are often  
13 sites of labor activities. Thus, if Plaintiffs have another rally on the edge of a state road  
14 (like those where DPS previously interfered), the Attorney General under SB 1363 would  
15 now have the ability (and arguably the duty) to prosecute them because he found their  
16 assembly “unreasonable”.

17          Even as to disputes arising under SB 1363 on non-state land, the AG is an  
18 appropriate defendant because ARS 41-193(A) says his “department shall: \* \* \* 4.  
19 Exercise supervisory powers over county attorneys of the several counties in matters  
20 pertaining to that office”. Last, when the Secretary of State is faced with issues of  
21 property ownership under the new listing statute, such issues will be resolved by the  
22 AG’s office unless there is some ground for disqualification. ARS 41-192. Hence unless  
23 the AG is a party in this suit and enjoined from enforcing SB 1363 and SB 1365, it would  
24 likely be just a matter of weeks before the AG’s office would seek to violate Plaintiffs’  
25 constitutional rights by enforcing these statutes. The propriety of suing the AG to block  
26 enforcement of an unconstitutional state law was recently noted in *Yes on Prop 200 v.*  
27 *Napolitano*, 215 Ariz. 458, 160 P.3d 1216 (Ariz. App. 2007):

28          In cases in which the constitutionality of a statute is being challenged, the  
Declaratory Judgments Act requires that the Attorney General be served

1 with a copy of the complaint, together with a claim of unconstitutionality,  
 2 and be allowed to respond on behalf of the State. A.R.S. § 12-1841  
 3 (Supp.2006). Accordingly, Arizona courts have uniformly held that the  
 4 Attorney General is an appropriate party to such cases because the  
 5 Attorney General's participation is authorized by the Declaratory Judgments  
 6 Act itself. *Ethington v. Wright*, 66 Ariz. 382, 388, 189 P.2d 209, 213  
 7 (1948); *City of Tucson v. Woods*, 191 Ariz. 523, 526-27, 959 P.2d 394,  
 8 397-98 (App.1997).

9 See *Okpalobi v Foster*, 190 F.3d 337, 343-47 (5<sup>th</sup> Cir. 1999)(finding *Ex Parte Young*  
 10 permitted suit against Governor and AG for injunctive relief against new law despite lack  
 11 of direct enforcement threats)(cited favorably in *Culinary Union v. Del Papa*, 200 F.3d  
 12 614, 619 (9<sup>th</sup> Cir. 1999)(no immunity even where AG withdrew threat to enforce)).

13           **3. Secretary of State Bennett is an appropriate defendant for this suit  
 14 because he is directly responsible for enforcing provisions of SB 1363**

15           Defendant Bennett is an appropriate defendant because he is directly responsible  
 16 for enforcing the trespass provisions of SB 1363: he is responsible for “compiling and  
 17 distributing ‘so-called ‘No Trespass Public Notice List’ to all law enforcement agencies  
 18 in the state in order to carry out the forced expulsion of any trade unionist whom an  
 19 employer asks to be expelled from some property.”” FAC ¶ 13. The Secretary’s office has  
 20 already indicated it will carry out this enactment absent further court order.

21           **4. Director Maruca is an appropriate defendant for this suit because he is  
 22 likely responsible for enforcing certain provisions of SB 1363 and  
 23 1365.**

24           DOL Director Maruca is in charge of processing workers’ wage claims when they  
 25 have wages deducted in violation of law, including presumably SB 1363 and 1365. No  
 26 express reference to his role is needed in such statutes because they are presumed not to  
 27 silently repeal existing wage collection laws. See *Gibbs v. O’Malley Lumber Co.*, 868 P.  
 28 2d 355, 177 Ariz. 342 (Ariz. App. 1994)(“repeal of statutes by implication is not favored  
 29 in the law. [cites”]). Workers filing these wage claims will argue with much justice that  
 30 dues collected in violation of these new laws are illegally-withheld wages. Section 3 of

1 SB 1363 amends an Arizona statute already enforced by DOL barring employers from  
 2 withholding any portion of employees' wages except in specified situations. ARS 23-352.  
 3 Similarly, workers' argument under SB 1365 will be that full dues deducted after one  
 4 year without a new signature are wages to which they are entitled to get DOL help in  
 5 recovering under the general wage collection statutes, ARS 23-356 and 213-357.<sup>11</sup>  
 6 Because a material threat of enforcement by DOL exists (in a process the employee can  
 7 start without paying a filing fee or hiring a lawyer), Plaintiffs are deterred from spending  
 8 money on politics and lobbying, and deterred from enforcing their dues agreements for  
 9 fear of spending time and money on DOL proceedings.

10           **E. IF THE COURT HAS ANY DOUBTS AS TO THE ABOVE,  
 11 IT STILL MUST GRANT LEAVE TO AMEND**

12           Plaintiffs could also add by amendment that UFCW in the last month has  
 13 handbilled or joined a workers' delegation in at least a half-dozen properties in Arizona.  
 14 These organizing campaigns are still ongoing and have resulted in threats to call law  
 15 enforcement and disagreements about credibility of union statements. Plaintiffs thus  
 16 reasonably believe that participants in at least one of these campaigns will end up pursued  
 17 by Defendants. Plaintiffs could also amend to note that UFCW is now renegotiating  
 18 contracts with Ace Parking, Sonoran Desert Museum, and Copper Queen Hospital which  
 19 expire by summer's end, and further explain how SB 1363 and 1365 are impairing their  
 20 bargaining power in these negotiations: these threaten their ability to use constitutionally-  
 21 protected weapons of speech and assembly, while at the same time making it easier for  
 22 employers to de-fund unions by pushing employees to refuse to reauthorize political  
 23

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24           <sup>11</sup> Even without such clear statutory authority, the federal DOL also considers in  
 25 enforcing wage laws whether a deduction is lawful outside wage laws: for example, if an  
 26 employer illegally deducts taxes which under tax law are the employer's own  
 27 responsibility, and the resulting net wages are below the minimum wage, the federal  
 28 DOL declares this a violation of federal minimum wage law. 29 USC 531.18. There is  
 no reason to suspect the state DOL will not similarly deem illegally-withheld dues to be a  
 form of wages which it can pursue administratively under ARS 23-356 and 23-357.

1 spending and/or seek early exit from their dues commitments under SB 1363. By  
2 amendment Plaintiffs can list the examples of Arizona employers who have disputed  
3 union allegations against them which could now lead to arrest for defaming an employer  
4 (or for violating an anti-defamation injunction ).

5 **V. CONCLUSION**

6 The State Defendants' motion to dismiss must be denied.

7 Dated: July 6, 2011

Respectfully submitted,

9  
10 DAVIS COWELL & BOWE LLP

11 By: /s/ Andrew J. Kahn

12  
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